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No. 94-1474

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
**October Term, 1995**

◆  
IDAHO, et al.,

*Petitioners,*

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,  
*Respondents.*

◆  
**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

◆  
**BRIEF FOR THE PETITIONER**

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## QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a state to adjudicate title to, and gain possession of, waters and submerged lands held by the state under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the state's equal footing title and will deprive the state of all practical benefits of ownership of the disputed waters and submerged lands.
2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks or navigable waters to an Indian tribe, thereby defeating a state's entitlement to such lands under the equal footing doctrine of the United States Constitution.

## PARTIES TO THE PROCEEDING

In addition to Coeur d'Alene Tribe, the appellants below include Ernest L. Stensgar, Lawrence Aripa, Margaret Jose', Domnick Curley, Al Garrick, Norma Peone and Henry Sijohn, individually, in their official capacity and on behalf of all enrolled members of Coeur d'Alene Tribe. The respondents below include, in addition to the State of Idaho, the Idaho State Board of Land Commissioners; the Idaho State Department of Water Resources; Phil Batt, Governor; Pete Cenarrusa, Secretary of State; Alan G. Lance, Attorney General; J.D. Williams, Controller; Anne Fox, Superintendent of Public Instruction; and Karl J. Dreher, Director, Department of Water Resources; each individually and in his official capacity.

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**BRIEF FOR THE PETITIONER****OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. at 1)<sup>1</sup> is reported at 42 F.3d 1244 (9th Cir. 1994). The opinion of the district court (Pet. App. at 29) is reported at 798 F. Supp. 1443 (D. Idaho 1992).

**JURISDICTION**

The court of appeals entered its judgment on December 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eleventh Amendment of the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, provides in relevant part:

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<sup>1</sup> All references to the appendix in this case are to the respective appendices in the Petition for the Writ of Certiorari (Pet. App.) or the Brief in Opposition to Petition for a Writ of Certiorari (Resp. App.).

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . .

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#### STATEMENT OF THE CASE

This action challenges two essential attributes of Idaho's sovereignty guaranteed by the United States Constitution – title to lands under navigable waters and immunity to suit in federal court. The Coeur d' Alene Tribe seeks to quiet title to the waters and beds and banks (hereinafter submerged lands) of Lake Coeur d'Alene and its associated waterways, the Coeur d'Alene River, the Spokane River and the St. Joe River. The Tribe's action threatens the sovereign authority of the state of Idaho, which assumed title and sovereignty over all submerged lands within its borders upon its admission to the Union on July 3, 1890.

The waterways at issue are adjacent to lands set aside for the use of the Coeur d'Alene Tribe by executive order on November 8, 1873. The original Coeur d'Alene Reservation encompassed the lands adjacent to Lake Coeur d'Alene, as well as lands adjacent to the lower reaches of the Coeur d'Alene River, the Spokane River and the St. Joe River. The Reservation was later reduced by agreement, however, and today only the lower reaches of the St. Joe River and the southern third of Lake Coeur d'Alene are within the exterior boundaries of the Coeur d' Alene Indian Reservation. Act of March 3, 1891, 26 Stat. 989, 1027.

Following the reduction of the Reservation, and the opening of the remaining Reservation lands to non-Indian settlement, Act of June 21, 1906, 34 Stat. 325, 335, private homes and businesses were located on the lands adjacent to Lake Coeur d'Alene. Residents of nearby cities and towns came to rely on the lake and the rivers for both commerce and recreation. Recognizing the importance of Lake Coeur d'Alene to the citizens of Idaho, the state legislature in 1927 dedicated and preserved the waters of Lake Coeur d'Alene for the purposes of "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code § 67-4304 (1995). The submerged lands of Lake Coeur d'Alene were "devoted to a public use in connection with the preservation of said lakes in their present condition as a health resort and recreation place for the inhabitants of the state." Idaho Code § 67-4305 (1995). The management of Lake Coeur d'Alene and other navigable waterways is vested in the state board of land commissioners, a constitutional body consisting of the governor, the attorney general, the secretary of state, the state controller, and the superintendent of public instruction. Idaho Code § 58-104(9) (1995).

State ownership of all submerged lands under navigable waters was confirmed by the Idaho Supreme Court in an action brought against the state board of land commissioners and a private yacht club seeking to enjoin a lease of the bed of Lake Coeur d'Alene for a marina. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983). As part of its decision upholding the lease, the court confirmed that under the equal footing doctrine and the Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215, Idaho holds title

to the submerged lands under Lake Coeur d'Alene for the use and benefit of the public. 671 P.2d at 1088.

The Coeur d'Alene Tribe brought the instant action against the state of Idaho, the state board of land commissioners and its members, the department of water resources, and the director of the department of water resources. The Tribe asserted title to the submerged lands and waters of all navigable waterways within the original Coeur d'Alene Reservation. The Tribe asked the federal district court to quiet title in the Tribe to the submerged lands and waters at issue, and to declare that the Tribe is entitled to the exclusive use and occupancy of submerged lands and waters. It asked the court to declare invalid all Idaho statutes, ordinances and regulations purporting to regulate, authorize use, or affect in any way the beds, banks and waters at issue. It also asked the court to permanently enjoin the defendants from regulating, permitting, or taking any action in violation of the Tribe's asserted right of exclusive use and occupancy. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (general federal question), 1343(4) (civil rights actions) and 1362 (actions brought by Indian tribes).

The state moved to dismiss the Tribe's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The state asserted the Eleventh Amendment barred the court from adjudicating the state's title to the submerged lands at issue. It also asserted the complaint failed to state a claim against the individual officers, since they held no title, claim or interest in the disputed lands. Following briefing and argument, the district court granted the motion and dismissed the case. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992), Pet. App. at 29.

The district court held that the Eleventh Amendment barred the Tribe's actions for relief against the state and state agencies. In regard to the action against state officials, the court held the Tribe's claims for declaratory and quiet title relief were barred by the Eleventh Amendment. 798 F. Supp. at 1449, Pet. App. at 39-40.

The court also concluded that the injunctive relief sought by the Tribe did not fall within the exceptions to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908), because the complaint failed, as a matter of law, to state a violation of rights protected and secured by federal law. 798 F. Supp. at 1449-52, Pet. App. at 40-47. In reaching its conclusion, the district court examined the Tribe's allegation that the 1873 executive order explicitly reserved title for the Tribe, and determined that such an allegation was not supported by the express language of the executive order. *Id.* The court relied on *Montana v. United States*, 450 U.S. 544 (1981), which interpreted a nearly identical provision in a treaty with the Crow Tribe of Montana. 798 F. Supp. at 1449-52, Pet. App. at 40-47. Based on the similarities in the provisions, the district court found that the Tribe's assertion of title under the 1873 executive order "is indefensible and is contrary to the clear holding in *Montana*, and the strong presumption in favor of these lands being conveyed to the state of Idaho upon its entry into the Union." 798 F. Supp. at 1451, Pet. App. at 46. Following the directives of the *Montana* decision, which requires an affirmative, pre-statehood action by Congress to defeat a state's title to submerged lands, the district court dismissed the Tribe's action in its entirety.

The Ninth Circuit Court of Appeals upheld the dismissal of the Tribe's claims against the state and the state agencies. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), Pet. App. at 1. The court of appeals, however, reversed the district court's decision insofar as it barred the Tribe from seeking injunctive and declaratory relief against the state officers. The court applied the three-prong test from the Court's plurality decision in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

- (a) Is this action asserted against officials of the State or is it an action brought directly against the State itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (3) Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

42 F.3d at 1250. Pet. App. at 10-11, quoting *Treasure Salvors*, 458 U.S. at 690.

The court of appeals determined that under the first prong of this test, the Tribe's action was not asserted against the state. The court of appeals reached this determination not by examining the effect of the action on the state's interests, but rather by resorting to the general principle defined in *Ex parte Young*, 209 U.S. 123 (1908), that suits alleging that state officers are in violation of federal law are not deemed to be suits against the state. The court noted that the Tribe "alleges that it holds the property at issue pursuant to an executive order that was

ratified as a federal statute." 42 F.3d at 1251, Pet. App. at 12. The Ninth Circuit concluded that "[b]ecause the Tribe has alleged that the actions of the Officials in exercising control over the property at issue violate this federal law, the Officials must be considered the real parties in interest in the claims against them." *Id.*

In regard to the second prong of the test, the court concluded that the Tribe's complaint "adequately alleges an ongoing violation of a federal right." The court did not explain the basis for this conclusion, but apparently assumed that state management of the lands would be inconsistent with tribal ownership. 42 F.3d at 1251, Pet. App. at 14.

The major portion of the court's opinion addresses the third prong of the test – whether the relief sought is prospective or whether it is analogous to a retroactive award. The court first examined a series of appellate and district court decisions holding that suits for injunctive and declaratory relief against state officers are barred by the Eleventh Amendment when the requested relief requires adjudication of a state's interest in disputed property. 42 F.3d at 1253, Pet. App. at 16-19. It then proceeded to explain why it was not following those decisions. The court recognized "the fiction that an action in violation of federal law cannot be an action of the state breaks down when confronted by the state's claim of title to property." 42 F.3d at 1254, Pet. App. at 21. Nonetheless, the court of appeals concluded that "this creates no exception to the rule that when federal law conflicts with the state's claim, state officials must act in accordance with federal law." *Id.* In the court's view, this conundrum was resolved when courts "allowed all relief other than

relief that would foreclose the state's claim in future judicial proceedings." *Id.* Thus, the court concluded that the district court "may decree the Tribe to be the owner of the property against all claimants except the state of Idaho and its agencies." 42 F.3d at 1255, Pet. App. at 22.

After finding that the Tribe's suit could proceed against the state officers, the court addressed the issue of whether the Tribe's complaint failed to state a claim for the submerged lands under the executive order initially establishing the Coeur d'Alene Reservation. The court assumed that all reservations in favor of Indian tribes should be treated as conveyances for purposes of determining whether a pre-statehood action was intended to defeat a future state's title to submerged lands. 42 F.3d at 1256-57, Pet. App. at 24-27. The court did not discuss decisions from this Court limiting the interests transferred to Indian tribes by executive orders. Nor did it discuss decisions from this Court establishing that only Congress has the authority to convey submerged lands to private parties.

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#### SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals erred in holding that the Coeur d'Alene Tribe may proceed with its action for recovery of the disputed submerged lands by obtaining declaratory and injunctive relief against state officers. This Court's decisions have repeatedly confirmed that disputes over submerged lands must start from the "established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v.*

*United States*, 450 U.S. 544, 553 (1981). The Tribe could not obtain the relief it requests without rebutting this presumption and adjudicating the question of the state's title. Because of the impossibility of proceeding without reaching the question of the state's title to the disputed lands, the action is barred by the Eleventh Amendment, even if the only remaining defendants are state officers.

The presumption of state title also removes this case from the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), allowing actions against state officers when the officer's actions are alleged to be unconstitutional. Because the state is operating under an established presumption of title, it was within the state's constitutional authority to authorize the officers to possess the submerged lands. Under such circumstances, the officer's actions are so closely identified with those of the state as to make it impossible to proceed against the officers without adjudicating the state's sovereign interests in the disputed lands.

The state is also able to establish immunity under the three part test established by a plurality of this Court in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). First, the nature of the Tribe's complaint establishes that the action is intended to adjudicate the sovereign interests of the state. Second, the challenged conduct of the state officers is not alleged to be either unconstitutional or outside the officers' statutory authority, and in fact is presumed to be constitutional under the equal footing doctrine. Third, the harm alleged by the Tribe is not the result of the ongoing management of the lands by the state, but rather is the result of the state's assumption of sovereignty over the submerged lands over a century

ago. The Tribe's action is therefore most analogous to retroactive relief and is barred by the Eleventh Amendment.

The court of appeals also erred in holding that executive orders issued without express congressional authorization may convey submerged lands to Indian tribes. This Court has repeatedly confirmed that the authority to defeat a state's equal footing title to submerged lands is vested exclusively in Congress by the Property Clause, which vests Congress with the entire dominion and sovereignty over territories. Congress never undertook to delegate such sovereign authority to the President. Although a general delegation of authority to reserve lands was established for the President by congressional acquiescence, such delegation was expressly limited by this Court to lands otherwise available for disposition under the general land laws. Even assuming that the President's authority extended to submerged lands, such authority was limited to the power to withdraw or reserve lands. The President could not convey submerged lands to Indian tribes. Therefore, any determination as to whether an executive order defeats a state's title to submerged lands must overcome the stronger presumption of state title established by this Court for alleged reservations of submerged lands.

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## ARGUMENT

### I. THE ELEVENTH AMENDMENT PROHIBITS THE USE OF AN OFFICER SUIT TO DETERMINE STATE TITLE TO SUBMERGED LANDS UNDER NAVIGABLE WATERS.

Suits seeking to dispossess government officers of property claimed by private citizens have vexed this Court for over a century. After it was established that sovereign immunity would prevent suits against the state and national governments to quiet title to disputed property, plaintiffs attempted to circumvent such immunity by suing government officers instead:

Enterprising claimants also pressed the so-called "officer's suit" as another possible means of obtaining relief in a title dispute with the Federal Government. In the typical officer's suit involving a title dispute, the claimant would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States. This suit would be in ejectment or, as here, for an injunction or a writ of mandamus forbidding the defendant officials to interfere with the claimant's property rights.

*Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 281 (1983). In *Block*, this Court recognized that if such suits were allowed, "all of the carefully crafted provisions of the [Quiet Title Act]<sup>2</sup>, deemed necessary for the protection of the national public interest could be averted." 461 U.S. at 284-85. Likewise, if officer

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<sup>2</sup> Codified at 28 U.S.C. §§ 2409a, 1346(f), and 1402(d).

suits are allowed against state officials, the right of the state under the Eleventh Amendment to determine whether third parties may sue it will be rendered a nullity.<sup>3</sup> The state submits that the Eleventh Amendment is not so narrow as to allow state claims to submerged lands to be tried behind the state's back simply by removing the state as a nominal party.

**A. Actions Seeking Ownership And Possession Of Submerged Lands Under Navigable Waters Necessarily Require Adjudication Of State Sovereign Rights.**

Although the crux of this case is the sovereign immunity guaranteed to Idaho by the Eleventh Amendment, analysis of the issue must begin with a discussion of the principles relating to the state's sovereign title to submerged lands. The unique nature of sovereign title will in large part determine whether suits against officers for possession of disputed submerged lands can proceed without affecting the sovereignty protected by the Eleventh Amendment.

One of the essential postulates of the United States Constitution is that states retain all aspects of sovereignty

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<sup>3</sup> This Court has often looked to cases against federal officers in determining the extent of sovereign immunity under the Eleventh Amendment: "[I]t cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

not expressly granted to the federal government or otherwise limited by the terms of the Constitution. Among these essential attributes of sovereignty is the English common law principle that ownership of submerged lands is inherent in the sovereign because it is vital to the sovereign's ability to control navigation, fishing, and other public uses of water. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). The principle arose because submerged lands "are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The title, *jus privatum*, of submerged lands is held by the sovereign, while "the dominion thereof, *jus publicum*, is vested [in the sovereign] as the representative of the nation and for the public benefit." *Id.*

When the 13 colonies became independent from Britain, they succeeded to the English Crown's title to submerged lands. Because it is implicit in the Constitution that subsequently admitted states enter the Union on an "equal footing" with the 13 original states, they too hold title to lands under navigable waters within their boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Upon admission, states have "absolute property in, and dominion and sovereignty over" all submerged lands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977), quoting *Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

Under the equal footing doctrine, Idaho's title to Lake Coeur d'Alene can be traced to the United States'

assumption of sovereignty over the Oregon Territory in 1848. Act of August 14, 1848, 9 Stat. 323. Once the United States assumes sovereignty over a Territory, it holds all navigable waters therein in trust for the benefit of the future states to be created from the Territory. *Shively v. Bowlby*, 152 U.S. at 49. Idaho assumed sovereign title to Lake Coeur d'Alene in 1890, when Congress admitted Idaho into the Union on an "equal footing with the original states in all respects whatever." Act of July 3, 1890, 26 Stat. 215 § 1. Title vested automatically in the state upon admission to the Union without further action from Congress. *Shively v. Bowlby*, 152 U.S. at 27.

The Idaho Admission Act, with its express guarantee of equal footing for Idaho, is legal documentation of Idaho's title to all submerged lands within its borders. The state's title "is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). State title is absolute and cannot be limited or modified by Congress: "Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact." *Shively v. Bowlby*, 152 U.S. at 34, quoting *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857).<sup>4</sup>

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<sup>4</sup> See also *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (recognizing "absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating").

In order to fulfill the above principles, any action involving title to submerged lands must necessarily start from the "established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v. United States*, 450 U.S. 544, 553 (1981). This presumption applies with equal force to submerged lands within the boundaries of Indian reservations. In *Montana*, the Court rejected the Crow Tribe's claim to the submerged lands of the Big Horn River, holding that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land. . . ." 450 U.S. at 554. In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Court held that the mere establishment of an Indian reservation did not operate "as a disposal of lands underlying navigable waters within its limits." *Id.* at 58.

Any allegation that Congress conveyed submerged lands to Indian tribes or other parties prior to statehood must overcome the strong presumption of state title by evidence demonstrating that Congress' intent to convey the lands was "definitely declared or otherwise made plain," was rendered "in clear and especial words," or "the claim confirmed in terms embraces the land under the waters of the stream." *Montana*, 450 U.S. at 552, quoting *United States v. Holt State Bank*, 270 U.S. at 55, *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842), and *Packer v. Bird*, 137 U.S. 661, 672 (1891). Further, because of the strong federal policy against conveyance, "it will not be held that the United States has conveyed such land

except because of 'some international duty or public exigency.' " *Montana*, 450 U.S. at 552, quoting *United States v. Holt State Bank*, 270 U.S. at 55.<sup>5</sup>

The presumption of state ownership is even stronger when the federal action alleged to defeat state title is a reservation of lands for a specific federal purpose. In such cases, the "land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 202. This Court has raised doubts as to whether a reservation of lands could ever be sufficient to defeat a state's title to such lands. *Id.* at 201. Nevertheless, it has ruled as follows:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself.

<sup>5</sup> The presumptions and burdens of proof required by *Montana* and other cases for conveyances of submerged lands are established "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Montana*, 450 U.S. at 552. In terms of authority, however, Congress is empowered under the Property Clause to convey submerged lands "whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects of which the United States hold the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1893). This authority, however, was rarely utilized, since it was "congressional policy to dispose of sovereign lands only in the most unusual circumstances." *Utah Div. of State Lands*, 482 U.S. at 197.

Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

482 U.S. at 202.

A final rule with respect to adjudication of disputes involving submerged lands is that "we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). Thus, disputes over submerged lands involve not only title, but necessarily require the court to inquire into the very nature of sovereignty and the purposes for which submerged lands are held. Immunities applicable to state claims in typical property disputes must apply with even greater force when the disputed property is submerged lands. Indeed, any analysis of sovereign immunity involving disputes over submerged lands must begin with a strong presumption of state ownership.

**B. Suits Against State Officers For Possession Of Property Are Barred When The Requested Relief Cannot Be Separated From Adjudication Of State Claims To The Property.**

Although the Court has defined various methods of analyzing disputes involving property held by state officers, they all are intended to answer the following core question: if the case proceeds, will federal judicial power be invoked against the sovereign interests of the state?

While early cases upheld officer suits on the basis that the Eleventh Amendment is "limited to those suits in which a state is a party on the record," *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824), later decisions repudiated this position. "[I]t must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question of whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.'" *Ex parte Ayers*, 123 U.S. 443, 487 (1887), quoting *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885). Instead, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984).

The most recent case to apply the Eleventh Amendment to property disputes is *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors*, a salvage company discovered the wreck of the Spanish galleon Atocha on submerged lands off the Florida coast. The state claimed ownership of the Atocha pursuant to a state statute declaring state ownership of all treasure

trove and artifacts abandoned on state property. Thus, the state entered into a salvage agreement with the company, granting 75% of the artifacts to the company and keeping 25% for the state. *Id.* at 673-75. When an unrelated action declared the lands under the wreck to be federal lands, the salvage company brought an *in rem* admiralty action to quiet its title to the artifacts in the possession of state officers. Since the items were outside the jurisdiction of the district court, the plaintiffs obtained a warrant of arrest requiring the state officers to surrender possession of the artifacts and deliver them into the possession of a custodian appointed by the court. *Id.* at 691.

In a plurality opinion, four members of the Court concluded that the warrant of arrest should be upheld because the state officers holding the property were acting without colorable authority. The lack of a colorable claim was based on the fact that this Court had previously determined that Florida did not own the submerged land on which the artifacts were found and that no state statute asserted ownership of artifacts on submerged lands outside the state's jurisdiction. 458 U.S. at 695-96 (plurality opinion). Likewise, the contract between the state and the salvage company did not purport to provide the state title to artifacts on non-state lands. *Id.* at 694-95. The plurality concluded, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id.* at 697. The plurality's statement infers that the opposite proposition is also true: where state officers have a colorable claim to possession of disputed property, they may invoke the

Eleventh Amendment to block actions for possession of the property.

Another four members of the Court, in a dissent authored by Justice White, believed that the state officers had a colorable claim under the contract for retaining possession of the artifacts. *Id.* at 713 (White, J., concurring and dissenting). Therefore, they concluded, the court could not order the state officers to surrender possession of the artifacts without reaching the merits of the state's claims. *Id.* at 716. Any inquiry into the validity of the officers' possession would, in the dissent's view, be "tantamount to deciding the question of title itself," a result barred by the Eleventh Amendment. *Id.* at 717.

Ultimately, the warrant to arrest was upheld, since Justice Brennan, in a separate opinion, concurred in the judgment allowing injunctive relief against the state officers. Justice Brennan, however, expressly rejected the plurality's rationale, concluding instead that the Eleventh Amendment did not apply to the situation at all, since the suit was between a state and citizens of that same state, and therefore outside the literal language of the Eleventh Amendment. *Id.* at 700-702 (Brennan, J., concurring and dissenting).

The one principle agreed to by both the plurality and the dissent in *Treasure Salvors* is that suits against state officers cannot be used as vehicles for adjudicating a state's rights to disputed property. The dissent would have examined the nature of the action and the relief sought to determine whether they "were actions invoking federal judicial power against the State and not merely its

agents." 458 U.S. at 705 (White, J., concurring and dissenting). The dissent's analysis focused on the practical effects of the requested relief on the state's title, and would bar any action where the requested relief could not be "divorced" from determination of the state's claims. 458 U.S. at 703. The plurality apparently agreed with this proposition. The plurality allowed the *in rem* warrant for possession of the property to proceed on the basis that it would not adjudicate state interests. The plurality's decision was based on two factors, the first being the limited nature of the judicial process at issue. The *in rem* arrest warrant merely required the state officers to bring the disputed property "within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." 458 U.S. at 691 (plurality op.). Thus, in the plurality's view, "the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts." 458 U.S. at 697. Additionally, the plurality did not believe that the arrest warrant would adjudicate any state claims because the plurality believed that the state did not have a colorable claim to adjudicate. 458 U.S. at 694-697.

Inquiring into whether requested relief can be granted without practically adjudicating the state's claims gives life to the policies underlying the Eleventh Amendment. This Court has long recognized the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other," *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring). Exceptions to the Eleventh Amendment, such as that embodied in *Ex*

*parte Young*, must therefore be narrowly crafted and applied only when absolutely necessary to ensure protection of federal interests. *Ex parte Young* does not apply where its application "would stretch that case too far and would upset the balance of federal and state interests that it embodies." *Papasan v. Allain*, 478 U.S. 265, 277 (1986).

One instance in which *Ex parte Young* does not apply is in actions to recover money from the state. This is true not because of the effect on the treasury per se, but because in such cases there is no way to avoid acknowledging that the state "is the real, substantial party in interest." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), quoting *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945).

Likewise, in the present case, there is no way to avoid acknowledging that the state of Idaho is the real, substantial party in interest. Real property held by the state under a colorable claim of title is indistinguishable from moneys held in the public treasury. In *Dugan v. Rank*, 372 U.S. 609 (1963), this Court stated that "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or the public domain, or interfere with the public administration.'" *Id.* at 620, quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947). Commentators have noted a similar rule in the English common law: "Where the Crown's title was involved, or an attempt was made to reach the Treasury, presumptively the act was treated as one directly against the Crown. . . ." Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-6 (1963). Indeed, a state's interest in submerged lands is even more inseparable from the state's sovereign

interests than is the public fisc. This Court has recognized that in cases involving submerged lands, "we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). Thus, it is impossible to imagine a set of circumstances where a federal district court could dispossess state officers from submerged lands without adjudicating issues affecting the very core of the state's sovereignty.

Determining the strength of the nexus between the relief sought against state officers and the adjudication of state claims to property is consistent with the focus on colorable claims adopted by the plurality in *Treasure Savors*. Where it appears that the state does not have a colorable claim to disputed property, it is more likely that the case can proceed without adjudicating state interests. On the other hand, if an officer is in possession of property under a colorable state claim, it is unlikely that the action can proceed without inquiring into the state's title. Indeed, where a colorable state claim exists, the authority-stripping fiction of *Young* has no application. *Young* depends on the fiction that the state cannot authorize an officer to undertake an unconstitutional action. Where a state possesses a colorable claim to property, however, it can unquestionably authorize its officers to possess the property. Under such circumstances, the officer is cloaked with the authority of the state. This is so even in cases where the officer's withholding of the property would be "tortious under general law." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949). If officers tortiously withholding property are covered by sovereign

immunity, it is axiomatic that officers holding property under color of title are also covered by sovereign immunity.

In determining whether a state possesses a colorable claim to disputed property, it will not always be necessary to go as far as the plurality did in *Treasure Salvors*. As the Seventh Circuit Court of Appeals has noted, "it is the existence, and not the strength, of the claim that activates the eleventh amendment." *Zych v. Wrecked Vessel Believed to be the "Lady Elgin,"* 960 F.2d 665, 670 (7th Cir. 1992). Likewise, the dissent in *Treasure Salvors* noted that going too far in adjudicating the validity of a state claim to title in order to determine jurisdiction "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." 458 U.S. at 703, quoting *Florida Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1351 (5th Cir. 1980) (Rubin, J., dissenting).

Even if this Court were to engage in a detailed examination of the state's claims, however, it is apparent from the allegations in the pleadings and the presumptions of the equal footing doctrine that Idaho has a colorable claim to the disputed submerged lands. Under the equal footing doctrine, "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States" and the "presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v. United States*, 450 U.S. 544, 552, 553 (1981). The Tribe's complaint raises this presumption by alleging that Idaho was admitted into the Union under the Idaho Admission Bill. Resp. App. at 9. This allegation is sufficient to create, on the

face of the pleadings, a presumption of state title to the disputed submerged lands. Given the presumption of state title, it is beyond question that the state could authorize its officers to possess the property. State officers acting under the presumption of state title are cloaked with the state's immunity, because it would be impossible to proceed against the officers without rebutting the presumption and adjudicating the validity of the state's claims to the submerged lands.

The fact that Idaho claims title to the disputed lands under the equal footing doctrine also distinguishes this case from decisions allowing suit under the doctrine of *Ex parte Young*. Actions seeking to dispossess the state of submerged lands do not implement the policy underlying *Young*, i.e., the need to ensure the supremacy of federal law over conflicting state statutes. "*Young* applies only where the underlying authorization upon which the named official acts is alleged to be illegal." *Papasan v. Allain*, 478 U.S. 265, 277 (1986). Here, the underlying authorization for the actions of the named officials is not the state statutes providing for management of the disputed lands, but rather the Idaho Admission Act and the United States Constitution. State title to submerged lands "is the result of federal action in admitting a state to the Union." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Allowing the Tribe to pursue the relief requested would thus do nothing to vindicate the supremacy of federal law over state law. Indeed, if the federal courts were to provide the relief requested by the Tribe, and enjoin enforcement of state laws and regulations regarding management of the disputed submerged lands, the state could still, through its officers, continue to exercise all inherent

rights of ownership. The court could enjoin state officers from possessing and exercising rights of ownership over the disputed lands only by adjudicating the State's claims to title under the Idaho Admission Act and the equal footing doctrine, a result barred by the Eleventh Amendment.<sup>6</sup>

### C. Even Under The Three-Prong Test Adopted By The Plurality In *Treasure Salvors*, The Tribe's Action Is Barred By The Eleventh Amendment.

The test adopted by the plurality in *Treasure Salvors*, and the one that the court of appeals purported to follow in this case, determines whether an action is barred by the Eleventh Amendment by examining the following three questions:

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<sup>6</sup> The Court may also consider the fact that a potential remedy exists for the Tribe's claims in Idaho's state court system. Idaho law allows the state to be named as a party defendant in actions "affecting the title to real or personal property in which the State has, or claims to have, an interest, lien or claim." Idaho Code § 5-328 (1990). As this Court has noted, the issue in Eleventh Amendment cases is not the "general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985), quoting *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279, 293-94 (1973) (concurring in result). Adjudication in a federal tribunal is not necessarily required in order to fulfill the interest of the national government in ensuring the supremacy of federal law. "It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero*, 473 U.S. at 238 n.2.

(a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (3) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

458 U.S. at 690.

The court of appeals misapplied the three-prong test from *Treasure Salvors* by failing to account for the presumptions favoring state claims to submerged lands. In the following sections, the state will apply the three-prong test in light of these presumptions and demonstrate the necessity of dismissing the action against the state officers.

#### 1. Is this action asserted against officials of the state or is it an action brought directly against the state itself?

The court of appeals held that the state officers named in the complaint were the real parties in interest, citing the rule of *Ex parte Young*. The court reasoned that "[b]ecause the state is unable to act in violation of federal law, declaratory relief that determines what federal law is and requires state officials to act accordingly cannot be considered relief against the state." 42 F.3d at 1255, Pet. App. at 22. Such rote recital of *Ex parte Young* fails to inquire far enough, however. In determining whether an action is barred by the Eleventh Amendment, this Court

has stated that it will "look to the substance rather than to the form of the relief sought, and will be guided by the policies underlying the decision in *Ex parte Young*." *Papasan v. Allain*, 478 U.S. 265, 279 (1986) (citations omitted).

A review of the complaint filed in this action leaves no doubt that the entire focus of this action is to obtain a ruling defeating Idaho's title to the submerged lands at issue. In addition to the state officers, the complaint names the state, the state board of land commissioners, and the state department of water resources as defendants. Resp. App. at 4. The complaint states that "the action seeks to quiet the Coeur d'Alene Tribe of Idaho's title in the beds, banks and waters at issue herein, declare that they are for the exclusive use and occupancy and quiet enjoyment of the Coeur d'Alene Tribe and its members and enjoin the defendants from taking any action in violation of those rights." Resp. App. at 4-5. The primary relief sought is quieting of the Tribe's asserted title, along with declaratory relief of such title. Resp. App. at 13. The injunctive relief that the Tribe seeks is not tailored to enforcement of allegedly unconstitutional state statutes by state officers; rather, it seeks to enjoin *all* defendants, including the state and the agencies, from "regulating, permitting or taking any action in violation of the plaintiffs' rights of exclusive use and occupancy, quiet enjoyment and other ownership interest." Resp. App. at 14.

Read in its entirety, it is clear that the injunctive relief sought against the officers is ancillary to and integral with the relief sought directly against the state. Even if the action against the officers can be artificially separated from the remainder of the complaint, the primary purpose of the complaint remains unchanged: to conclusively

establish the Tribe's alleged title to the disputed submerged lands vis-à-vis the state of Idaho.

The court of appeals' conclusion that the Eleventh Amendment is not violated by allowing "all relief other than relief that would foreclose the State's claim in future judicial proceedings" is especially troubling, because it ignores the nature of a sovereign's interest in submerged lands. Sovereign title to submerged lands has two facets: *jus privatum*, the legal title to such lands, and *jus publicum*, the right to exercise dominion over the lands for the public benefit. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The court of appeals' decision would purport to leave undecided the state's legal title, but would allow relief prohibiting state officers from managing the lands for the public benefit. Such adjudication reaches the very core of state sovereignty, and is, if anything, even more intrusive than adjudication of the state's legal title. Under the common law, legal title to submerged lands was the lesser component, and in fact could be vested in someone other than the Crown. Even when granted to private parties, however, title to submerged lands continued to be charged with the rights of the public, *jus publicum*, and was held subject to the public rights of navigation and fishing. *Id.* at 12-13. Thus, the most critical component of sovereign title to submerged lands is the sovereign's authority to manage and control such lands for the public benefit. Any relief decreeing that state officers cannot manage and control submerged lands necessarily adjudicates the most critical aspect of the state's sovereign title, *jus publicum*, and is prohibited by the Eleventh Amendment.

Moreover, it is fantasy to pretend that the relief sought by the Tribe will not adjudicate the state's legal title to the disputed lands. It is true that strict principles of *res judicata* may not apply when the state is not a nominal party to a suit determining title to disputed property. Nonetheless, any disposition in this case in favor of the Tribe will be a practical bar to further assertions of state legal title. A decision by a federal district court adjudicating title to be in the Tribe, once confirmed by the court of appeals, would be precedent for all future actions. For all practical purposes, the state would be forever foreclosed from asserting its sovereignty over the disputed property.

**2. Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights?**

Some of this Court's early decisions, such as *United States v. Lee*, 106 U.S. 196 (1882), seemed to adopt a general rule allowing plaintiffs to proceed against government officers whenever it was alleged that the officers were in wrongful possession of disputed property. *Lee* has been limited, however, by a number of cases, primarily *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In *Larson*, the Court was presented with a suit against the War Assets Administrator to enjoin him from selling coal that the plaintiff claimed pursuant to contract. The plaintiff, citing *Lee* and other cases, argued that government officials may be sued whenever it is alleged that they hold specific property to which the plaintiff has title, since such action is illegal as a matter of general law

and therefore beyond the official's authority, making the official amenable to suit as an individual. The Court held that the *Lee* decision circumvents sovereign immunity "[o]nly where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." 337 U.S. at 697. The Court also held that suits against officers are allowed where the act alleged is beyond the authorities conferred on the officer by statute, so that the officer's actions "are ultra vires his authority and therefore may be made the object of specific relief." *Id.* at 689. *Larson* brought officer suits within the general principles established in *Ex parte Young*, 209 U.S. 123 (1908), where the Court held that when a state officer is seeking to enforce an unconstitutional statute, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160.

Since this Court's decision in *Larson*, the minimum threshold for retention of disputes over property in the possession of state officers is that the complaint make out a "claim that the holding constitutes an unconstitutional taking of property without compensation." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962), quoting *Larson*, 337 U.S. at 697. In the alternative, the complaint must allege that the officers' conduct exceeds the authority delegated to the officers by the state. If such a claim is made, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." *Larson*, 337 U.S. at 690. Where the plaintiff fails to advance such claims, the action is "rightly dismissed" as an action which "in substance and effect" is one against the sovereign. *Malone*, 369 U.S. at 648.

The Tribe's complaint fails to allege harm within either prong of the *Larson* test. The complaint merely alleges as follows:

Defendants' statutes, ordinances, regulations, actions and usages unlawfully purport to regulate, authorize, use or otherwise affect beds and banks and waters at issue herein in violation of the plaintiffs' rights of ownership, including the right of exclusive use and occupancy and the right of quiet enjoyment.

Complaint, Resp. App. at 10.

The Tribe's complaint fails the first prong of the *Larson* test because it fails to expressly allege an unconstitutional taking of property. The complaint also fails the second prong of the *Larson* test. Nothing on the face of the complaint alleges that the state officers are acting outside the scope of the authority conferred on them by state statutes. The complaint merely asserts that the state statutes "unlawfully" purport to regulate the disputed submerged lands. Under *Larson*, the mere allegation that an officer "wrongfully holds property to which the plaintiff has title" is not sufficient to establish that the officer "is not exercising the powers delegated to him by the sovereign." 337 U.S. at 693. At most, the complaint describes a case of tortious interference with alleged property rights, which, under *Larson*, is not sufficient to evade sovereign immunity. *Id.* at 695.

The Tribe's complaint is most analogous to cases where the plaintiff claims property which the officer holds under an admittedly constitutional statute, but questions the sovereign's interpretation of that statute. In such cases, the Court has dismissed the action as being

against the sovereign. For example, in *Oregon v. Hitchcock*, 202 U.S. 60 (1906), the plaintiffs sought to restrain the Secretary of the Interior and the Commissioner of the General Land Office from allotting or patenting swamp lands claimed by the state of Oregon within the Klamath Indian Reservation. Oregon claimed title to the lands under federal statutes granting to the states all "swamp and overflowed lands" within their respective limits. *Id.* at 61. The federal defendants denied that the statutes applied to the disputed lands. The Court, in ordering dismissal of the action, quoted the following language from *Minnesota v. Hitchcock*, 185 U.S. 373 (1902):

Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, — to devest the government of its title, and vest it in the state. The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as a defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question

of the effect of the judgment or decree which can be entered.

202 U.S. at 69.

The Court reached the same result in *Louisiana v. Garfield*, 211 U.S. 70 (1908). The state of Louisiana sued the Secretary of Interior and the Commissioner of the General Land Office to establish the title of Louisiana to certain swamp lands and "to enjoin the defendants against carrying out an order making a different disposition of the lands." *Id.* at 74. The state alleged that title had passed to it by reason of a congressional act purporting to "grant to the state of Louisiana the whole of the swamp and overflowed lands therein." *Id.* The federal government retained the lands on the basis that they did not pass to the state because they had been previously withdrawn for use as a military reservation. *Id.* The Court held that the case could not proceed against the officers, since the "United States might, and undoubtedly would, deny the fact of such possession, and that fact cannot be tried behind its back." *Id.* at 78. Thus, the Court dismissed all aspects of the case, including the requested injunctive relief. *Id.*; see also *New Mexico v. Lane*, 243 U.S. 52, 58 (1917) (barring suit against Secretary of Interior and Commissioner of the General Land Office to establish the state's title to certain lands and enjoin the defendants from issuing a third party a patent to the disputed lands "on the ground that the suit is one against the United States").

The latest decision in this line of cases is *Malone v. Bowdoin*, 369 U.S. 643 (1962), a common law action of ejectment brought against an officer of the United States

Forest Service. The United States held title to the disputed lands, but the plaintiff claimed that the grant to the United States was ineffective because the grantor held only a life estate in the property. *Id.* at 644 n.2. The Court noted that in *Oregon v. Hitchcock*, *Louisiana v. Garfield*, *New Mexico v. Lane*, and other cases "it was held that suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity." 369 U.S. at 646. The Court went on to dismiss the suit "as an action which in substance and effect was one against the United States without its consent." *Id.* at 648.

The above cases establish the principle that in disputes over ownership and possession of property, sovereign immunity bars actions for injunctive relief against government officers where the dispute centers on the interpretation of an otherwise constitutional statute, contract or other instrument. Where both the plaintiff and the officer claim the property under color of law, the fiction that the officer's conduct can be separated from that of the government simply cannot be maintained because of the impossibility of granting the requested relief without adjudicating the validity of the government's claims to the property.

Here, the basis and authority for the officers' possession of the disputed lands rests on the federal statute admitting Idaho into the Union on an equal footing with every other state. It is beyond dispute that it was within Congress' constitutional powers to admit Idaho into the Union. It is also beyond dispute that under the Constitution, such admission carries with it title to all submerged lands, unless Congress acted to convey the lands prior to

statehood. The pleadings before the Court therefore do not describe a situation where state officers are conducting themselves in an allegedly unconstitutional manner; rather, they describe a dispute where each side's claim is based on differing interpretations of the federal statute admitting Idaho into the Union and the federal actions creating the Coeur d'Alene Reservation. Thus, this case is most like *Oregon v. Hitchcock*, *Louisiana v. Garfield*, and similar cases, where the disputes between the claimants and the defendants were based on differing interpretations of federal statutes affecting the disposition of property. In such cases, the action of the officer cannot be artificially separated from the authority of the state, and sovereign immunity applies.

**3. Is the relief sought by plaintiff permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?**

In *Treasure Salvors*, the plurality determined that the relief was not analogous to a retroactive award because it "did not seek any attachment of state funds and would impose no burden on the state treasury." 458 U.S. at 698. It also relied on the fact that "[i]n this case Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials." *Id.* at 699. Likewise, in this case, the court of appeals relied on the fact that the Tribe "is not seeking damages or restitution for past wrongs, nor is it seeking to rescind a past transfer of property." 42 F.3d at 1255, Pet. App. at 22 (citations omitted).

This Court, however, has warned against such a narrow focus on the lack of burdens on the state treasury. In *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), this Court stated that "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment." *Id.* at 1124. As the Court noted there, the "Eleventh Amendment does not exist solely to 'preven[t] federal court judgments that must be paid out of a State's treasury,' it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.*, quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. \_\_\_, 115 S. Ct. 394, 404 (1994), and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The "line between permitted and prohibited suits will often be indistinct." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). "In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, and will be guided by the policies underlying the decision in *Ex parte Young*." *Id.* at 278-79 (citations omitted).

Some of those policies are as follows:

Young's applicability has been tailored to conform as closely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Consequently, Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal

law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.

*Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) (citations omitted).

The relief sought by the Tribe in this case fails to fulfill such policies for two reasons. First, as discussed above, the underlying authority for the officers' possession of the disputed submerged lands is not a state statute, but rather the federal act admitting Idaho into the Union on an equal footing with all other states. Thus, there is no "necessity" in this case for allowing the intrusion of federal judicial power on the sovereignty of the state, since there would be no vindication of federal versus state authority.

Second, even if one can make out a case for violation of federal law, such violation occurred over a century ago. The true crux of the Tribe's action is not the ongoing management of the submerged lands by state officers: it is the state's assumption of sovereignty over the disputed lands on July 3, 1890. The harm alleged by the Tribe is the result of that single, discrete act. If the Tribe were to proceed against the state officers, the essence of its action would be to rescind the state's assumption of sovereignty over the disputed submerged lands and return the lands to the Tribe. After a century of state ownership, including judicial decisions confirming the state's title, *Kootenai*

*Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983), the Tribe's action is most analogous to retroactive relief and is barred by the Eleventh Amendment.

## II. CLAIMS TO SUBMERGED LAND BASED SOLELY ON EXECUTIVE ORDERS FAIL TO STATE A CAUSE OF ACTION BECAUSE THE PRESIDENT MAY NOT CONVEY SUBMERGED LANDS TO INDIAN TRIBES WITHOUT EXPRESS CONGRESSIONAL AUTHORIZATION.

The equal footing doctrine is a fundamental guarantee of sovereignty to all states. A critical component of state sovereignty is the control and management of submerged lands. As discussed above, federal policy was to hold submerged lands within territories in trust for future states. Although this Court has recognized that Congress, with its plenary authority over territories under the Property Clause, may convey submerged lands to third parties prior to statehood, it has also recognized that congressional policy placed severe limitations on when such conveyances could be made. The question presented in this case is whether the President is vested with the authority to circumvent such congressional policies by conveying submerged lands to Indian tribes without express congressional authorization.

The Coeur d'Alene Tribe alleges that title to the disputed submerged lands was reserved for the benefit of the Tribe in an executive order issued November 8, 1873. The executive order was issued pursuant to the President's general authority, not pursuant to a specific delegation of congressional authority. The court of appeals'

opinion assumed that executive order reservations created for the benefit of Indian tribes are indistinguishable from congressional conveyances of submerged lands to Indian tribes. 42 F.3d at 1256, Pet. App. at 25-26. In doing so, the court of appeals ignored decisions from this Court limiting the interests transferred to Indian tribes by executive orders and requiring congressional action in order to defeat a state's equal footing title to submerged lands. The court's opinion denies Idaho, without reason or analysis, the protections embodied in over 200 years of congressional policy as confirmed by this Court's decisions.

The court of appeals first erred by assuming that the President has inherent authority to defeat a state's equal footing title. This Court has repeatedly emphasized that the authority to defeat a state's equal footing title is vested in Congress. The source of Congress' authority is the Property Clause, which vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Const., Art. IV, § 3, cl. 2. Congress' authority over submerged lands derives not from the mere ownership of federal property, but from the fact that it exercises sovereignty over territories:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in territorial condition. . . .

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

*Utah Div. of State Lands v. United States*, 482 U.S. 193, 196-97 (1987), quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Thus, the authority to grant submerged lands to third parties is firmly rooted in Congress' powers under the Property Clause. Repeated decisions of this Court confirm that the authority over public lands vested in Congress by the Property Clause is exclusive. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). Absent a specific delegation of congressional authority, the President could no more grant submerged lands to third parties than the President could admit states into the Union.

Congress has never undertaken a general delegation of its authority to convey submerged lands. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), this Court did find that Congress, by a long-term pattern of acquiescence to presidential actions, had implicitly delegated to the President the authority to withdraw portions of the public domain from settlement. *Id.* at 469-74. The basis for the Court's holding, however, demonstrates that this implicit delegation is limited in effect. The Court held

that implicit delegation was proper because "the land laws are not of a legislative character in the highest sense of the term, . . . 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " *Id.* at 474, quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905). While such reasoning may apply to routine land dispositions, it has no application to acts alleged to defeat a state's equal footing title. As this Court has often noted, Congress has "never undertaken by general land laws to dispose of land under navigable waters." *Utah Div. of State Lands*, 482 U.S. at 197. Instead, congressional policy was "to dispose of sovereign lands only in the most unusual circumstances." *Id.* In other words, dispositions of submerged lands are of a "legislative character," and are not subject to delegation by acquiescence. Even an express delegation of authority to the President to permanently reserve submerged lands would have to be specific and unambiguous. In discussing the extent of the authority delegated to the Secretary of Interior to designate Indian reservations in Alaska, the Court stated that "a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104 (1949).

Moreover, the only delegation of authority confirmed in *Midwest Oil* was the authority to withdraw lands open to disposition under the general land laws:

[The President] has, during the past eighty years, without express statutory authority, — but under the claim of power to do so, — made a multitude of Executive orders which operated to

withdraw public land that would otherwise have been open to private acquisition.

*Midwest Oil*, 236 U.S. at 469 (emphasis added). As this Court noted in *Utah Div. of State Lands*, submerged lands were "exempt from sale, entry, settlement, or occupation under the general land laws." 482 U.S. at 203. Thus, by limiting its holding to lands otherwise open to private acquisition, the *Midwest Oil* decision applies only to uplands, and does not apply to submerged lands. Indeed, this Court has never recognized a general authority on behalf of the President to effect the disposition of sovereign submerged lands.<sup>7</sup>

Assuming arguendo that an executive order could affect a state's entitlement to submerged lands, the court of appeals nonetheless erred by failing to distinguish between conveyances and reservations of submerged lands. The equal footing test employed in *Montana* and

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<sup>7</sup> Under its terms, the 1873 executive order was clearly intended to apply only to uplands. The Order, in describing the boundaries of the Reservation, provides as follows: "It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians. . . ." Executive Order of November 8, 1873, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The language recognizing that the reservation consisted only of lands "withdrawn from sale" can only be interpreted as an intention to limit the Reservation to general public lands and omit submerged lands. The term "public lands," has long been understood to mean only "such land as is open to sale or other disposition under general laws." *Bardon v. Northern Pac. R. Co.*, 145 U.S. 535, 538 (1892).

other cases addresses only those instances where an individual alleges that Congress conveyed title to him prior to statehood. Where a plaintiff alleges that a reservation of land defeats a state's equal footing title, a more stringent test is required, as this Court explained in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987):

When Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. When Congress reserves land for a particular purpose, however, it may not also intend to defeat a future State's title to the land. The land remains in federal control, and therefore may still be held for the ultimate benefit of future States.

482 U.S. at 202. The Court went on to hold that "[a]ssuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title," the United States would have to show congressional intent to include submerged lands within a reservation and "would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Id.*

Because of the crucial difference between conveyances and reservations, the court of appeals erred by not critically examining the nature of the federal act creating the original Coeur d'Alene Reservation to determine whether it could be construed, as a matter of law, as a conveyance of title to the Tribe. In fact, the court ignored long-standing decisions of this Court holding that the President has never been delegated general authority to "convey" federal properties to Indian tribes.

In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), this Court reviewed the delegation "to withdraw public lands from sale" as found in *Midwest Oil*, and addressed "whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians." *Id.* at 326. The Court found it "significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Id.* at 327. After reviewing this and other indications of congressional intent, the Court concluded that Congress had never delegated authority to the President to convey reservation lands to Indian tribes. *Id.* at 331. Thus, executive orders designating reservations "were effective to withdraw from sale the lands affected and to grant the use of the lands to the [tribe]." *Id.* Tribes residing on executive order reservations are "tenants at the will of the Government" who hold "a mere temporary and cancelable possessory right." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 178 (1947).

If the President cannot convey uplands to Indian tribes, it is axiomatic that he cannot convey submerged lands held in trust for future states. Thus, the court of appeals erred when it assumed that executive orders establishing Indian reservations may "convey" title to Indian tribes, including title to submerged lands.

In conclusion, the court of appeals erred when it analogized executive order reservations to reservations established by Congress. From 1873 to 1891, the date that

Congress formally established the Coeur d'Alene Reservation, the Tribe held only a tenancy at will to reservation lands. During that time, the federal government retained full legal title to the disputed submerged lands. Thus, establishment of the Coeur d'Alene Reservation was not inconsistent with the notion of continued federal trusteeship of the submerged lands for the future state of Idaho. For purposes of a 12(b)(6) motion, such continued federal trusteeship must be presumed unless the plaintiff identifies a federal action that could conceivably be sufficient to defeat the state's title. Because the Tribe failed to allege any federal action that can, as a matter of law, be regarded as sufficient to defeat Idaho's title to the submerged lands, the district court properly dismissed those portions of the Tribe's complaint based on the executive order. Even assuming arguendo that an executive order could ever defeat a State's entitlement to submerged lands, the issue of title under the executive order should be remanded to the court of appeals and the district court for further factual findings with directions that the Tribe's claims must be denied unless the Tribe carries its burden under *Utah Div. of State Lands* of proving that the executive order was "affirmatively intended" to defeat Idaho's title to the disputed submerged lands.

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#### CONCLUSION

The judgment of the Ninth Circuit Court of Appeals allowing the Coeur d'Alene Tribe to obtain a decree of its alleged title to the disputed waters and submerged lands, and injunctive relief ordering state officers to act in accordance with such title, should be reversed. Additionally,

those portions of the judgment holding that the executive order establishing the Coeur d'Alene Indian Reservation may be sufficient to convey the disputed submerged lands to the Tribe should be reversed.

Respectfully submitted,

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